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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HOWARD E. HINKIE, SR., ET AL,
Plaintiff-Petitioners

v.

UNITED STATES OF AMERICA, ET AL,
Defendant-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Does the *Feres* doctrine bar all claims against the United States for genetic deficiencies causing birth defects of one and death of another of children and miscarriages and mental suffering of the wife of a serviceman caused by his exposure to radiation while on active duty in the United States Army?

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PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Third Circuit whose judgment is sought to be reviewed are as follows: Howard E. Hinkie, Sr. and Irene Hinkie as parents and natural guradians of Paul Hinkie, Irene Hinkie individually, Howard E. Hinkie, Sr., Administrator of the Estate of Timothy Hinkie, Deceased, Appellees; United States of America, Appellant. The defendant, Reynolds Electrical and Engineering Company, is not involved in the Government's original Motion to Dismiss under Rule 12(b)(1) nor in the appeal to the Third Circuit Court of Appeals. All original defendants except the United States and Reynolds Electrical and Engineering Company have been dropped from this suit by Amended Complaint filed December 11, 1980. Howard E. Hinkie, Sr. is a party to the proceeding in a representative capacity, only.

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HOWARD E. HINKIE, SR., ET AL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit reported at 715 F.2d 96 appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Pennsylvania which was reversed on appeal, is reported at 524 F. Supp. 277.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 18, 1983. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Tort Claims Act
28 U.S.C. §1346(b)

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

Irene Hinkie, her son, Paul, and the Estate of her deceased son, Timothy, brought separate independent causes of action against the United States and Reynolds Electrical and Engineering Company for injury and birth defects caused by the exposure of Howard E. Hinkie, Sr. to radiation during his service with the United States Army. In the Amended Complaint Irene's claim is for miscarriages and emotional suffering, Paul's for birth defects and Timothy's for birth defects and resulting death.

The plaintiffs brought suit against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C., §1346 (b), (hereinafter designated as FTCA). The United States moved to dismiss this action pursuant to Rule 12(b) (1), Federal Rules of Civil Procedure, and urged upon the District Court the argument that the plaintiffs are not entitled to a remedy on the grounds that the Court lacked subject matter jurisdiction and that the Amended Complaint failed to state a claim upon which relief can be granted. The Government based its argument on the premise that the plaintiffs' claims are barred by *Feres v. United States*, 340 U.S. 135 (1950) wherein the Supreme Court created an exception to the general waiver of immunity under the FTCA.

The District Court denied the Government's Motion and the United States moved for reconsideration or, in the alternative, certification of the issue for interlocutory appeal. The District Court, on August 5, 1982, certified the matter for interlocutory appeal which was granted by the Third Circuit Court of Appeals on August 3, 1982.

The Circuit Court reversed the order of the district Court concluding that these claims are barred under the *Feres* doctrine and that Court's decision in *Mondelli v. United States* (filed July 15, 1983), 711 F.2d 567.

REASONS FOR GRANTING THE WRIT

POINT I

THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH AN EARLIER DECISION OF THIS COURT

POINT II

THE HOLDING OF THE CIRCUIT COURT IS AN UNNECESSARY AND UNWARRANTED EXTENSION OF THE POLICY CONCERNS ANNOUNCED BY THIS COURT IN *FERES*, AND THUS PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED AND SETTLED BY THIS COURT

POINT III

THE CIRCUIT COURT'S INTERPRETATION OF THE FTCA, WHICH TREATS ROSEMARIE MONDELLI DIFFERENTLY FROM SIMILARLY SITUATED CIVILIAN INFANTS, PURELY ON THE BASIS OF HER STATUS AS THE CHILD OF A FORMER SERVICEMAN, PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW, WHICH SHOULD BE REVIEWED AND SETTLED BY THIS COURT

This Court has pending before it a Petition for a Writ of Certiorari filed in *Mondelli v. United States*, (3rd Cir. No. 82-5545) which has set forth the above Points in support of the granting of a Writ. The underlying issues in that Petition are identical with those present here. Counsel in *Mondelli* has set forth clear and concise reasons in their Petition and cogent arguments in support of those reasons. Petitioner here incorporates the reasons, arguments and legal authorities set forth in *Mondelli* and urges upon this Court that there is a clear necessity for a current analysis of the *Feres* doctrine and

its application to a class of plaintiffs represented by the Hinkie family; Rosemarie Mondelli; Denise Monaco, *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989, 1982; the Lombard family, *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1983), *cert. denied*, ____ U.S. ____, 103 S. Ct. 3086 (1983); the Laswell children, *Laswell v. Brown*, 683 F.2d 261 (8th Cir. 1982), *cert. denied, Laswell v. Weinberger*, ____ U.S. ____, 103 S. Ct. 1205 (1983); Charles Scales, *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, ____ U.S. ____ 103, S. Ct. 1772 (1983).

POINT IV

THE CIRCUIT COURT'S RELIANCE UPON *CHAPPELL* IS NOT WARRANTED AND EXTENDS A RULE APPLICABLE TO MILITARY DISCIPLINE TO PLAINTIFFS WHO ARE IN A CIVILIAN STATUS

The decision of this Court in *Chappell v. Wallace*, ____ U.S. ____ 76 L. Ed 2d 586 (1983) and its application of the military discipline factor in *Feres* does not present a controlling rule affecting the civilian status of the Hinkie family.

Chappell deals directly with the relationship of the servicemen and their superior officers in a *Bivens* type of lawsuit for constitutional torts directly against government employees in their individual capacities. *Chappell's* reliance on the *Feres* doctrine considers only one factor, that is: the "peculiar and special relatonship of the soldier to his superiors, and the effect on the maintenance of such suits on dicipline". Neither *Chappell* nor the cases considered in the Opinion deal with civilian claims against the government or employees in their individual capacities. On the basis of the difference and distinguishable facts in *Hinkie*, the *Chappell* decision is not controlling.

What is most significant is the recognition by this Court of the distinction between civilian and military claims where in *Chappell* it is pointed out:

> The special status that the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. *Burns v. Wilson*, supra., 346 U.S. at 140. The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by judicially created remedies exposing officers to personal liability at the hands of those they are charged to command. 76 L.Ed 2d at 593.

And, a further significant point in *Chappell* that limits its application is the further holding that:

> This Court has never held, nor do we now hold, that military personnel are barred from alm redress in civilian courts for constitutional wrongs suffered in the course of military service. 76 L.Ed 2d at 593.

The Court here fully recognizes that our court system is still an open forum for military personnel under certain situations (not enumerated in *Chappell*); it is difficult to conclude, therefore, that this Court would foreclose a lawsuit by civilians under the facts in this case.

CONCLUSION

It has been clearly demonstrated that this Court in *United States v. Brown*, 348 U.S. 110 (1954) strongly rejected the "but for" rule on which the government and the Circuit Court relied. The Circuit Courts in *Scales*, *Lombard* and *Monaco* offered various apologies to the claimants for being bound by what they considered to be a proper application of the rationale dictated by *Feres* and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). It is only necessary to look at the language of the Fifth Circuit in *Scales v. United States*:

> For the foregoing reasons, we are compelled, however reluctantly, to reverse the judgment of the District Court and dismiss the claim as barred by *Feres*. We are not blind to the tragedy of Charles' condition, and we regret the effects of our conclusion. Nevertheless, we are not writing on a clean slate. 685 F.2d at 974.

And in *Lombard v. United States*, the Circuit Court of Appeals for the District of Columbia concluded:

> In rendering this decision, we are not without very considerable sympathy for Theodore Lombard and his family. This is particularly true for the Lombard children for whom there is at present no viable means of redress for the injuries they may have suffered. Because we must adhere to *Feres* and other controlling decisions, however, we must find that the claims of the members of the Lombard family were properly dismissed for lack of subject matter jurisdiction. 690 F.2d at 227.

And, the Ninth circuit in *Monaco v. United States*, in its conclusion holds:

> The *Feres* doctrine today stands on shaky ground with its precise justifications somewhat confused . . . The result in this case disturbs us, particularly

> with respect to Denise. In her case, the price of avoiding examination of events long past, and involving her behavior in no respect, appears to be complete denial of recovery. If developed doctrine did not bind us, we might be inclined to make an exception in cases such as this. 661 F.2d at 134.

In the proper application of a rule of law the Courts should not be required to offer such apologies. For this and the other reasons, it is urged upon this Court that a Writ of Certiorari should issue to review the opinion of the Circuit Court.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1554

HINKIE, Howard E. Sr.; HINKIE, Irene; HINKIE, Paul a minor by his parents and natural guardians Howard E. and Irene Hinkie; HINKIE, Howard E. Sr., Administrator of the Estate of Timothy Hinkie, deceased, on behalf of all others similarly situated.

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY, VETERANS ADMINISTRATION, JIMMY CARTER, President, JAMES R. SCHLESINGER, Secretary of Energy, MAX CLELAND, Administrator of the Veterans Administration, DR. JAMES LIVERMORE, Deputy Assistant Secretary of Energy, DR. CLARENCE LUSHBAUGH, Administrator, Medical Division, Oak Ridge Associated Universities, GLENN T. SEABORG, former Head, Atomic Energy Commission, ROBERT A. LOVETT, former Secretary of Defense, BRIGADIER GENERAL WILLIAM C. BULLOCK, U.S. Army, Commander of Camp Desert Rock, and certain other past and present officers of the U.S. Department of Energy, U.S. Department of Defense, Department of the Army, the former Atomic Energy Commission, and the Veterans Administration who will be named as defendants when ascertained, individually and in their official capacities.

REYNOLDS ELECTRICAL AND ENGINEERING CO., INC., 2501 Wyandotte Street, Las Vegas, Nevada 89114; E G & G INC., 45 William Street,

Wellesley, Massachusetts 02181; HOLMES & NARVER INC., 400 E. Orangethorpe Avenue, Anaheim, California 92801; UNITED STATES FILTER CORP., 522 Fifth Avenue, New York, New York 10036; ROCKWELL INTERNATIONAL CORP., 600 Grant Street, Pittsburgh, Pennsylvania 15219; VICTOREEN INSTRUMENT CO., INC., 10101 Woodland Avenue, Cleveland, Ohio 44104; SHELLER-GLOBE CORP., 1505 Jefferson Avenue, Toledo, Ohio 43624; BECKMAN INSTRUMENTS INC., 2500 Harbor Boulevard, Fullerton, California 92632

United States of America, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 79-2340)

Argued: June 14, 1983

Before: HUNTER and HIGGINBOTHAM, *Circuit Judges* and ZEIGLER, *District Judge**

(Filed August 18, 1983)

J. PAUL McGRATH
Assistant Attorney General

PETER F. VAIRA, JR.
United States Attorney

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* Honorable Donald E. Zeigler, United States District Judge for the Western District of Pennsylvania, sitting by designation.

SUSAN P. ENGELMAN (Argued)
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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

We are forced once again to decide a case where "we sense the injustice . . . of [the] result"[1] but where nevertheless we have no legal authority, as an intermediate appellate court, to decide the case differently.

Plaintiffs-appellees, Irene Hinkie, wife of Howard Hinkie, her son Paul, and the estate of her deceased son Timothy, brought this action against the United States and Reynolds Electrical and Engineering Company. The gravamen of plaintiffs-appellees' complaint is that Irene's miscarriages, Paul's birth defects, and Timothy's birth defects and death were caused by the exposure of Howard Hinkie to radiation during active duty in the United States Army almost thirty years ago. The complaint avers that any injuries suffered by plaintiffs were incident to Howard Hinkie's military service, and that his alleged exposure to radioactive materials occurred while he was on active duty in the Army. Plaintiffs-

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1. *Mondelli v. United States*, No. 82-5545 (filed July 15, 1983), Typescript Opinion at 8.

appellees have alleged that the Federal Tort Claims Act, 28 U.S.C. §2671-80, *et seq.*, and 28 U.S.C. §1346(b) and 28 U.S.C. §1331(a) provide the jurisdictional basis for their claims against the defendant-appellant United States of America.

Before the district court, the defendant-appellant United States moved for the dismissal of the action on the grounds that the court lacked jurisdiction over the subject matter of the action and that pursuant to the doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950), the complaint fails to state a claim upon which relief can be granted.

In a most thoughtful opinion, Judge Norma L. Shapiro, denied the government's motion to dismiss. *Hinkie v. United States*, 524 F.Supp. 277 (E.D. Pa. 1981). The United States moved for reconsideration and vacation of that denial, or, alternatively, for certification of the issue for interlocutory appeal. Thereafter, the District Court, certified its order of denial for interlocutory appeal under 28 U.S.C. §1292(b).[2] Defendant-Appellant petitioned this Court for permission to take an interlocutory appeal and by Order dated August 31, 1982, that petition was granted.

I.

It is undisputed that Howard Hinkie's recovery, for injuries due to exposure to radioactive material while he was on active duty in the United States Army some thirty years ago, is barred under *Feres v. United States*. *See Jaffee v. United States*, 663 F.2d 1226, 1232 (3d Cir.

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2. The question certified to this court for interlocutory appeal is:

> Does the *Feres* doctrine bar suit against the United States for a mother's miscarriages and birth defects and death of children if the injuries were caused by the Army's negligent exposure of their husband and father to harmful levels of radiation in the course of his former military service?
>
> Appendix, p. 84

1981) (en banc); *cert. denied*, 456 U.S. 972 (1982). Irene, Paul and the estate of Timothy sue for injuries incident to chromosonal damage suffered by Howard Hinkie while he was in military service. Irene alleges injuries in the form of miscarriages, Paul in the form of birth defects and the estate of Timothy in the form of birth defects that led to his death. We find that these claims are also barred under the *Feres* doctrine and our most recent decision in *Mondelli v. United States*, No. 82-5545 (filed July 15, 1983).

The *Feres* doctrine, in addition to barring injuries suffered by military personnel incident to active duty military service, extends to service-related suits when the injury to a civilian has its genesis in the actionable injury suffered by the military personnel incident to military service. *Mondelli* barred recovery under the FTCA to a daughter who suffered genetic injuries due to her father's participation in the test of a nuclear device while on active military duty.

Although the result is admittedly harsh,[3] we conclude that the facts of *Hinkie* are not legally distinguish-

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3. Almost two years ago we held that a serviceman, Stanley Jaffee, and his wife had no cause of action under the Federal Torts Claims Act despite the fact that in 1953.

> he and other active soldiers at Camp Desert Rock in the State of Nevada were ordered by their commanding officers to stand in a field without benefit of any protection against radiation while a nuclear device was exploded a short distance away. Even though the defendants allegedly knew they were exposing Jaffee and the other soldiers to grave risk of injury and death, they 'knowingly, deliberately and recklessly disregarded this knowledge by compelling Jaffee and the other soldiers to participate in the test.' [citation omitted] As a result of this exposure to radiation, Jaffee developed inoperable cancer in November of 1977.

Jaffee v. United States, 663 F.2d at 1229.

Judge Gibbons wrote an eloquent and forceful dissent in which he stated:

able from *Mondelli*, and we therefore must reverse the decision of the district court.

As was noted in *Mondelli*:

> Rarely does the law visit upon a child the consequences of actions attributed to the parents. *Cf. Trimble v. Gordon*, 430 U.S. 762, 769 (1977);

NOTE — *(Continued)*

> These allegations charge a violation of human rights on a massive scale. The plaintiffs seek to prove, and we must at this stage assume that they can, that civilian and military officials of the government, acting without legal authority and with no sufficient legitimate military or other purpose, conducted a human experiment upon soldiers subject to their control, without their knowledge, permission or consent, by exposing them to radiation which those officials knew to be dangerous
>
> . . .
>
> Indeed the complaint alleges conduct which would violate the Universal Declaration of Human Rights, the International Govenant on Civil and Political Rights, the Geneva Convention, the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Nuremberg Code. The international consensus against involuntary human experimentation is clear. *A fortiori* the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt.

Jaffee, 663 F.2d at 1248-50; (footnotes omitted).

Partially in response to the dissent, the majority stated:

> We are also aware of what some might call a harsh result in our holding. We are not suggesting that individuals in plaintiffs' position should never receive any additional compensation from either the federal government or from private defendants which would supplement their present rights under the Veterans' Benefits Act. Any decision on whether claims of the plaintiffs should be converted to a cause of action, however, should be reserved for Congress to make in these special circumstances. It is that body which must weigh the competing priorities and policy judgments to determine whether a cause of action should be created.

Jaffee, 633 F.2d at 1228.

In the two year interim after the opinion in *Jaffee*, there has still been no Congressional resolution of this vexing problem.

> *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). Nevertheless, the Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline. Although these are delicate policy judgments, they are in the final analysis committed to Congress. Consequently, we conclude, with reluctance, that the claims of [the child] are barred.

Typescript Opinion at 8.

Just as it seemed unfair in *Mondelli* to deny the child the right to recover, it seems equally unfair to "visit upon" the spouse without recompense for the incidental consequences of actions attributable to her husband's military service.

Because the controlling precedent forecloses any other option, the order of the district ccurt will be reversed and the case remanded for proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 79-2340)

Present: HUNTER and HIGGINBOTHAM, *Circuit Judges*, and ZEIGLER, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 14, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered August 6, 1982, be, and the same is hereby reversed and the cause remanded for proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

Clerk

August 18, 1983

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* Honorable Donald E. Zeigler, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on September 9, 1983.
Test:

Chief Deputy Clerk,
U.S. Court of Appeals
for the Third Circuit